A

PP v. MOHAMAD ROSLAN DESA

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
JAMES FOONG FCJ
B [CRIMINAL APPEAL NO: 05-28-2007(K)]
18 JANUARY 2010

Abstract – *Similar fact evidence, if it is admissible, should be admitted for a specific purpose and not merely because it shows system. That purpose may be to negative accident or to prove identity or to prove intention or to rebut a defence which would otherwise be open to the accused. It is important for the prosecution to tender the similar fact for a specific purpose. It is for the court, as a rule of judicial practice, to consider whether the evidence which is proposed to be adduced is sufficiently substantial, having regard to the purpose to which it is professedly directed to make, it is desirable in the interest of justice that it should be admitted.*

C

D

E ***CRIMINAL PROCEDURE:*** *Acquittal and discharge – Appeal against – Appeal by prosecution – Accused charged for murder under s. 302 of Penal Code – Accused discharged and acquitted – Whether trial court gave proper consideration to salient points of prosecution's case and made proper inferences from those salient points – Whether prima facie case established*

F ***EVIDENCE:*** *Circumstantial evidence – Similar fact evidence – Accused charged for murder under s. 302 of Penal Code – Prosecution attempted to admit trial records of another case involving accused where accused pleaded guilty to charge under second limb of s. 304 of Penal Code for causing death of victim – Whether there was similar fact evidence – Whether displayed similar pattern or modus operandi of accused – Whether, because of similar facts pattern in both cases, two offences must have been committed by same person*

G

The dead body of the deceased was discovered in a drain and the post-mortem report revealed that her death was caused by the fracture to her second and third cervical spine. The respondent and another individual ('Safuani') were arrested and charged at the High Court for murder, under s. 302 of the Penal Code ('PC'). PW11, a friend of the respondent, testified that: (i) the respondent had punctured the tyre of the deceased's car using a knife; (ii) when the deceased left in her car, the respondent and PW11 followed the deceased on the respondent's motorcycle; (iii) when the deceased realised that she had a flat tyre, the respondent approached the deceased and helped her to change the tyre. The deceased then gave both of them her calling card; (iv) a day or two later, the respondent met PW11 and

H

I

asked for the deceased's calling card, saying 'ada lubang kerja'; and (v) he was with the respondent, PW13 and Safuani at a housing area, attempting to steal the sports rim of a car, and they went there in the car belonging to the deceased. In the midst of stealing the car's rim, PW10 came out to inspect, causing them to flee the scene on foot, where Safuani left his mobile phone in the deceased's car. The investigating officer found the said mobile phone and a knife in the car. In the course of the trial, the prosecution attempted to admit the trial records of another case involving the respondent, at the Sessions Court, where the respondent pleaded guilty to a charge under the second limb of s. 304 of the PC for causing the death of a woman ('ID39'). At the close of the prosecution's case, the High Court acquitted the respondent and Safuani on the grounds that: (i) the possession of the items belonging to the deceased and the manner of how the respondent obtained such items had not been proved; and (ii) the prosecution invited the court to infer that it was the respondent who stole the deceased's car after she was killed. However, the probability of either the respondent or Safuani who killed the deceased was insufficient to conclude that the respondent was the person who killed the deceased. The decision of the High Court was affirmed by the Court of Appeal. Hence, the present appeal. The prosecution contended that the courts below erred in finding that the prosecution failed to establish a *prima facie* case on the charge, in failing to: (i) admit the similar fact evidence in ID39. The purpose of tendering ID39 was to show a pattern or *modus operandi* of the respondent and to prove identity. Because of the similar facts pattern, as disclosed in ID39, and the facts in the present case, therefore, the two offences must have been committed by the same person; and (ii) give proper consideration to the salient points of the prosecution's case and thus failed to make proper inferences from those salient points.

Held (allowing appeal)
Per Arifin Zakaria CJ (Malaya) delivering the judgment of the court:

(1) ID39 showed the steps taken by the respondent leading to the commission of the earlier offence. The respondent first deflated the tyre of the victim's car and then followed the victim. On the pretext of rendering assistance to the victim, he then approached the victim and having got her trust, he got into the car and stabbed the victim with a knife. Having killed the victim, the respondent dropped off the victim at some place and drove off with the car before abandoning the car. The respondent took the victim's belongings and jewellery. Some of these items were later recovered by the police from the respondent. The courts below rejected the similar fact evidence on the basis that there was no striking similarity between what happened in the earlier case and the present case. Both the High Court and the Court of Appeal erred in rejecting ID39. The facts in ID39, when compared to the *modus operandi* in the present case, were very much similar. The respondent had

pleaded guilty to the earlier offence as disclosed in ID39. In the circumstances, the evidence of the earlier offence must be treated as fully cogent. Whatever prejudice the earlier offence may have on the respondent, it was far outweighed by the probative value of the evidence that was sought to be admitted. (paras 23, 25, 27 & 28)

(2) The evidence, in particular the possession of the car and other personal items belonging to the deceased, was sufficient to trigger the presumption under s. 114(a) of the Evidence Act 1950 that a person who is in possession of the stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for it. This presumption could also be indicative of any other more aggravated crime which was connected to the theft. The High Court and the Court of Appeal fell into error in holding that the possession of the car belonging to the deceased could probably be that a third party had sold the deceased's car to the respondent. This was contrary to the established principle that it was not for the court, at the close of the prosecution's case, to provide a defence for the accused. (paras 35 & 36)

(3) The orders of the High Court, as affirmed by the Court of Appeal, were set aside. The prosecution had clearly made out a *prima facie* case against the respondent. ID39 was directed to be admitted as evidence by the High Court. The High Court was directed to call upon the respondent to enter his defence. (paras 28, 37 & 38)

Bahasa Melayu *Headnotes*

Mayat si mati telah ditemukan dalam sebatang longkang dan laporan bedah siasat mendedahkan bahawa kematiannya adalah disebabkan keretakan pada tulang belakang serviksnya. Responden dan seorang lagi individu ('Safuani') ditangkap dan dituduh di Mahkamah Tinggi kerana membunuh, satu kesalahan bawah s. 302 Kanun Keseksaan ('KK'). PW11, rakan si mati, memberi keterangan bahawa: (i) responden telah memancitkan tayar kereta si mati menggunakan pisau; (ii) apabila si mati memandu keretanya, responden dan PW11 mengekori si mati dengan menunggang motosikal responden; (iii) apabila si mati menyedari tayarnya pancit, responden mendekati si mati dan membantunya menukar tayar. Si mati kemudian memberikan kad namanya kepada mereka; (iv) selang sehari dua, responden bertemu dengan PW11 dan meminta kad nama si mati dan berkata 'ada lubang kerja'; dan (v) PW11, bersama-sama responden, PW13 dan Safuani, cuba mencuri sports rim sebuah kereta di satu kawasan perumahan dan mereka ke sana menaiki kereta milik si mati. Semasa cuba mencuri rim kereta tersebut, PW10 keluar untuk memeriksa dan ini menyebabkan mereka lari meninggalkan tempat kejadian lalu Safuani tertinggal telefon bimbitnya dalam kereta si mati. Pegawai penyiasat menemukan telefon bimbit tersebut bersama-sama sebilah pisau dalam kereta itu. Semasa

perbicaraan, pihak pendakwaan memohon penerimaan masuk rekod perbicaraan satu lagi kes yang melibatkan responden, di Mahkamah Sesyen, yang mana responden mengaku bersalah untuk pertuduhan bawah cabang kedua s. 304 KK kerana menyebabkan kematian seorang wanita ('ID39'). Pada penutup kes pendakwaan, Mahkamah Tinggi melepaskan dan membebaskan responden dan Safuani atas alasan: (i) milikan barang-barang kepunyaan si mati dan cara bagaimana responden memiliki barang-barang tersebut tidak dibuktikan; dan (ii) pihak pendakwaan mempelawa mahkamah untuk menyimpulkan bahawa responden yang mencuri kereta si mati selepas dia dibunuh. Walau bagaimanapun, kemungkinan responden atau Safuani yang membunuh si mati tidak cukup untuk menyimpulkan bahawa responden adalah individu yang membunuh si mati. Keputusan Mahkamah Tinggi disahkan oleh Mahkamah Rayuan. Maka timbul rayuan ini. Pihak pendakwaan menegaskan bahawa mahkamah bawahan terkhilaf dalam memutuskan pihak pendakwaan gagal membuktikan kes *prima facie* terhadap pertuduhan kerana gagal: (i) menerima masuk keterangan sama fakta dalam ID39. Tujuan pengemukaan ID39 adalah untuk menunjukkan corak atau *modus operandi* responden dan untuk membuktikan identiti. Berikutan corak sama fakta, seperti yang didedahkan dalam ID39, dengan fakta dalam kes ini, kedua-dua kesalahan semestinya telah dilakukan oleh orang yang sama; dan (ii) memberi pertimbangan wajar pada perkara-perkara yang menonjol dalam kes pendakwaan dan, susulan itu, gagal membuat kesimpulan wajar berdasarkan perkara-perkara menonjol tersebut.

Diputuskan (membenarkan rayuan)

Oleh Arifin Zakaria HB (Malaya) menyampaikan penghakiman mahkamah:

(1) ID39 mempamerkan langkah-langkah yang diambil oleh responden menjurus pada perlakuan kesalahan terdahulu. Responden terlebih dahulu memancitkan tayar kereta mangsa sebelum mengekorinya. Berhelahkan ingin membantu mangsa, dia mendekati mangsa dan sesudah memperoleh kepercayaannya, memasuki kereta mangsa dan menikamnya dengan pisau. Usai membunuh mangsa, responden meninggalkan mangsa di satu tempat dan berlalu pergi dengan kereta tersebut sebelum meninggalkan ia. Responden mengambil barang-barang dan barang kemas milik mangsa. Sebahagian barang-barang ini dirampas oleh pihak polis daripada responden. Mahkamah bawahan menolak keterangan sama fakta atas alasan tiada persamaan ketara antara kejadian dalam kes terdahulu dengan kes ini. Mahkamah Tinggi dan Mahkamah Rayuan terkhilaf dalam menolak ID39. Fakta dalam ID39, apabila dibandingkan dengan *modus operandi* dalam kes ini, amat serupa. Seperti yang didedahkan melalui ID39, responden mengaku bersalah atas kesalahan terdahulu. Dalam hal sedemikian, keterangan kesalahan terdahulu mestilah dianggap sepenuhnya meyakinkan. Apa-apa prejudis dalam kesalahan terdahulu yang mungkin ada pada responden, jauh lebih diberati oleh nilai probatif keterangan yang ingin diterima masuk.

(2) Keterangan, khususnya milikan kereta dan barang-barang peribadi milik si mati, cukup untuk membangkitkan anggapan bawah s. 114(a) Akta Keterangan 1950 bahawa, seseorang yang ada dalam milikannya barang curi selepas sahaja barang itu dicuri ialah pencuri barang itu atau telah menerima barang itu dengan disedarinya sebagai barang curi, melainkan jika dia boleh menerangkan bagaimana barang itu berada dalam milikannya. Anggapan ini juga boleh menunjukkan mana-mana lain jenayah lebih berat yang bersangkutan dengan kecurian. Mahkamah Tinggi dan Mahkamah Rayuan terkhilaf apabila memutuskan bahawa milikan kereta kepunyaan si mati mungkin terjadi kerana pihak ketiga telah menjual kereta si mati pada responden. Ini bercanggah dengan prinsip yang sudah terpahat bahawa mahkamah tidak berperanan menyediakan pembelaan buat tertuduh pada penutup kes pendakwaan.

(3) Perintah-perintah Mahkamah Tinggi, yang disahkan oleh Mahkamah Rayuan, diketepikan. Pihak pendakwaan ternyata berjaya membuktikan kes *prima facie* terhadap responden. ID39 diperintahkan agar diterima masuk oleh Mahkamah Tinggi sebagai keterangan. Mahkamah Tinggi diperintahkan memanggil responden membela diri.

Case(s) referred to:
Amathevelli P Ramasamy v. PP [2009] 3 CLJ 109 FC ***(refd)***
Black (1995) Crim LR 640 ***(refd)***
Hoch v. R (1988) 165 CLR 292 ***(refd)***
Jones v. Dunkel (1958-59) 101 CLR 298 ***(refd)***
Makin v. Attorney General For New South Wales (1894) AC 57 ***(refd)***
R v. Boardman (1975) AC 421 ***(refd)***
RV Raju & Ors v. R [1952] CLJU 99; [1952] 1 LNS 99 HC ***(refd)***
Sunentheran Selvaraja v. PP (MRRJ No: W-09-15-2002) (Unreported) ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 14, 15, 114(a)
Penal Code, ss. 302, 304

For the appellant - Nurulhuda Nur' Aini Mohamad Nor; DPP
For the respondent - Akberdin Abdul Kadir, Radzuan Ibrahim & Hajinder Singh; M/s Akberdin & Co

[Editor's note: For the Court of Appeal judgment, please see PP v. Mohd Roslan Desa & Anor [2009] 4 CLJ 824 (overruled). Appeal from High Court, Alor Setar; Criminal Case No: 45-21-2001 (overruled).]

Reported by Najib Tamby

JUDGMENT

Arifin Zakaria CJ (Malaya):

Introduction

[1] This is an appeal by the prosecution against the decision of the Court of Appeal delivered on 9 April 2007, dismissing the prosecution's appeal against the decision of the High Court.

[2] The charge proferred against the respondent reads:

> Bahawa kamu bersama-sama di antara 23.12.1998 jam lebih kurang 9.00 malam hingga 24.12.1998 jam lebih kurang 5 petang di antara Jalan Solok Sembilan, Seberang Jaya, Butterworth, Pulau Pinang hingga ke suatu kawasan parit di Kampung Padang Buluh, Tikam Batu, Kuala Muda, Kedah Darul Aman telah dengan sengaja membunuh seorang perempuan Ooi Yean Wah K.P. No: 741119-07-5340 dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama-sama dengan seksyen 34 Kanun Keseksaan.

[3] Both the accused persons were acquitted and discharged at the close of the prosecution case without their defence being called. The prosecution appealed to the Court of Appeal against the said decision with regard to the respondent. No appeal was filed with regard to the second accused Safuani bin Abdul Aziz. The Court of Appeal dismissed the appeal and hence this appeal.

The Facts

[4] The facts relevant to this appeal are briefly as follows: On 24 December 1998 at about 5pm, a dead body, which was later identified that of Ooi Yean Wah (the deceased), was found by PW2 in a drain near the roadside of Kampong Padang Buloh, Tikam Batu, Kedah. The post-mortem report revealed that the deceased suffered a penetrating injury to the left iliac crest. The cause of the death was due to the fracture to the second and third cervical spine.

[5] According to the deceased's father (PW16), the last time he saw his daughter was on 23 December 1998 at about 12 noon. The deceased left the house driving her Proton Iswara, silver metallic colour, bearing registration number PCK 6951. His daughter worked as a part-time insurance agent. He lodged a missing person report with the Bukit Mertajam police station when the deceased did not return home on 24 December 1998.

[6] PW6, whose work was designing banners and making plate numbers, testified that on 24 December 1998, he was approached by the respondent in his shop to make a new car plate bearing number PCL 3523 using plate number PCK 6951 as sample.

[7] On 27 December 1998, at about 4am, PW10 found a car No. PCL 3523 parked behind his house. In the boot of the car, he found a tyre rim belonging to him. He noticed that the registration number of the car displayed on the car and the number on the road tax were different. He also noticed some buns used for making burgers in the boot of the car.

[8] The investigating officer (PW22) inspected the car and found a knife at the driver's side of the car. He also discovered a mobile phone belonging to Safuani's father. Safuani is the second accused person in this case. From

his investigation, it is confirmed that Safuani had used the mobile phone on 23 December 1998. Safuani and the respondent were arrested on 27 December 1998. Both of them were charged for murder under s. 302 of the Penal Code.

[9] A friend of the respondent (PW11) testified that some time in December 1998, he assisted the respondent in selling burgers. In December 1998, he saw the respondent punctured the tyre of the deceased's car using a knife. When the deceased left in her car, the respondent and PW11 followed the deceased on the respondent's motorcycle. When the deceased realised that her car tyre was flat, the respondent then approached the deceased, and he helped her to change the tyre. After the tyre was changed, the deceased gave both of them her calling card and RM2. One or two days later, the respondent met PW11 and asked for the deceased's calling card. The respondent told PW11 "ada lubang kerja".

[10] According to PW11, on 27 December 1998, he was with the respondent, PW13 and Safuani at a housing area, attempting to steal the sports rim of a car. They went there in a Proton Iswara belonging to the deceased, driven by the respondent. In the midst of stealing the rim of the car, PW10 came out to inspect. PW11, the respondent, PW13 and Safuani fled the scene on foot, leaving behind the deceased's car. Safuani left his handphone in the deceased's car.

[11] The prosecution's case against the respondent rests entirely on circumstantial evidence. The prosecution's attempt to admit the trial records of another case involving the respondent (ID39) was not allowed by the trial judge. ID39 is the charge sheet and note of evidence, including the facts of the Butterworth Sessions Court Case No: 62-68-99, wherein the respondent pleaded guilty to a charge under the second limb of s. 304 of the Penal Code for causing the death of a Chinese woman.

The Decision Of The High Court

[12] The trial judge held that the possession of items belonging to the deceased and the manner of how the respondent obtained such items had not been proved. He said that based on the evidence before him, the prosecution invited the court to infer that it was the respondent who stole the deceased's car after she was killed and the prosecution's failure to prove "common intention" was also significant. The probability of either the respondent or Safuani who killed the deceased was insufficient for the court to conclude that the respondent was the person who killed the deceased. The respondent was acquitted and discharged.

The Decision Of The Court Of Appeal

[13] The Court of Appeal agreed with the trial judge's assessment that properly considered the evidence which the prosecution seeks to adduce as "similar fact" did not reveal features of such "striking similarity" as to be

of positive probative value. The Court of Appeal also agreed that the failure to prove common intention was fatal. On the possession of things belonging to the deceased, the Court of Appeal stated:

> The learned Judge was clearly in the circumstances of this case right in taking into consideration the fact that possession of items belonging to the deceased and the manner of how the 1st Respondent obtained such items had not been proved, as well as the absence of evidence as to how the deceased was killed. We agree with his finding that the evidence adduced merely invited the Court to infer that it was the 1st Respondent who stole the deceased's car after the deceased was killed, or, the probability that a third party had sold the deceased's car to the 1st Respondent. We agree that the failure to prove common intention was fatal.

The Issues Before This Court

[14] Learned Deputy contended that the learned trial judge and the Court of Appeal erred in finding that the prosecution failed to establish a *prima facie* case on the charge, on two main grounds:

(i) in failing to admit the similar fact evidence; and

(ii) in failing to give proper consideration to the salient points of the prosecution case and thus failed to make proper inferences from those salient points.

[15] We shall first deal with the issue of rejection of similar fact evidence by the courts below.

Similar Fact Evidence

[16] The prosecution sought to adduce ID39 as similar fact evidence. This was rejected by the High Court and affirmed by the Court of Appeal. It is the submission of learned Deputy that ID39 is admissible pursuant to ss. 14 and 15 of the Evidence Act 1950. ID39 was the note of proceeding and the charge sheet in respect of the Butterworth Sessions Court Case No: 62-68-99, where the respondent was charged for an offence under the second limb of s. 304 of the Penal Code. The facts of the case which were admitted by the respondent are as follows:

Fakta Kes

> Pada 11 Disember 1998 jam 8.50 malam Lee Hooi Teng (K.P. No.750625-07-5268) Simati telah menghadiri suatu majlis perpisahan rakan pejabatnya di Restoran Sriwan, Bandar Sunway, Prai, Pulau Pinang.
>
> Pada masa yang sama juga OKT berada di tempat letak motosikal berhampiran Restoran itu. OKT kemudian telah mengeluarkan angin tayar kereta milik Simati iaitu PDS 8625.

Selepas majlis di restoran tersebut Simati telah memandu kenderaannya dan diekori oleh OKT. Disimpang tiga Bandar Sunway, OKT yang menunggang motosikal telah berhenti disisi kenderaan Simati dan memberitahu Simati yang tayar keretanya pancit. Simati kemudian memberhentikan kenderaannya dan bertanya di mana ada kedai yang dapat membaiki tayar tersebut.

OKT menyatakan yang dia boleh membantu Simati menukar tayarnya dan Simati bersetuju.

Setelah selesai menukar tayar tersebut OKT telah menaiki kenderaan Simati untuk di hantar ke tempat di mana kawan OKT menunggunya.

Sampai di tempat Kilang ACER ketika Simati membuat pusingan "U" OKT telah letakkan sebilah pisau di pinggang Simati.

Simati telah cuba melawan dan di dalam pergelutan OKT telah menikam simati.

OKT kemudian telah membawa kenderaan tersebut ke Jalan Permatang Nibong dan meninggalkan simati disitu.

OKT kemudian telah membawa kenderaan PDS 8625 dan ditinggalkan di Flat Taman Hj. Mohd. Amin, Bukit Tengah.

Pada 11 Disember 1998 jam lebih kurang 11.00 malam L/Kpl. Ishak Othman (Pengadu) telah menerima panggilan telefon menyatakan bahawa satu perempuan Cina terbaring di tepi Jalan Permatang Nibong.

Siasatan yang dijalankan oleh ASP Rajagopal mendapati bahawa OKT telah menyebabkan kematian Simati.

Hasil tangkapan OKT juga barang-barang kemas dan handphone Simati, telah diperolehi semula.

Post Mortem yang dijalankan oleh Dr. Zulkifli bin Manshor mendapati sebab kematian Simati adalah kehilangan darah akibat tikaman (Hypovolemic shock secondary to stab wound).

(AHMAD FAIRUZ BIN ZAINOL ABIDIN)
Timbalan Pendakwa Raya
Pulau Pinang.

[17] Relying on the principles as laid down in *Makin v. Attorney General For New South Wales* (1894) AC 57, learned Deputy contended that ID39 should have been admitted as similar fact evidence by the High Court. In *Makin,* the Privy Council stated at p. 65 that:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if

> it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

[18] This proposition of law was followed in another leading case of *R v. Boardman* (1975) AC 421. Lord Salmon at p. 461 observed;

> ... evidence against an accused which tends only to show that he is a man of bad character with a disposition to commit crimes, even the crime with which he is charged, is inadmissible and deemed to be irrelevant in English law ... To admit such evidence would be unjust and would offend our concept of a fair trial to which we hold that everyone is entitled. *Nevertheless, if there is some other evidence which may show that an accused is guilty of the crime with which he is charged, such evidence is admissible against him, notwithstanding that it may also reveal his bad character and disposition to commit crime.* (emphasis added)

[19] In the local case *R v. Raju & Ors v. R* [1952] CLJU 99; [1952] 1 LNS 99; [1953] 1 MLJ 21, Spenser Wilkinson J after referring to *Makin v. Attorney General For New South Wales*, *Harris v. Director Of Public Prosecution* and *Noor Mohamed v. Rex*, *Rex v. Straffen* and the decision of the Court of Appeal in *X v. Public Prosecutor* held that similar fact evidence, if it is admissible, it should be admitted for a specific purpose and not merely because it shows system. That purpose he said may be to negative accident, or to prove identity or to prove intention, or to rebut a defence which would otherwise be open to the accused. It is therefore important, he said, for the prosecution to tender the similar fact for a specific purpose. It is then for the court, as a rule of judicial practice, to consider whether, the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed to make, it is desirable in the interest of justice that it should be admitted.

[20] Learned Deputy submitted that the purpose of tendering ID39 is to show the pattern or *modus operandi* of the respondent and to prove identity. She argued that because of the similar facts pattern as disclosed in ID39 and the facts in the present case therefore the two offences must have been committed by the same person.

[21] In this connection, we should also have regard to what was said by Mason CJ, Wilson and Gandron JJ in the Australian case of *Hoch v. R* (1988) 165 CLR 292 at p. 294:

> The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged ...

[22] And at p. 295, they made the following observation which deserves quoting:

> Where the happening of the matters said to constitute similar facts is not in dispute and there is evidence to connect the accused person with one or more of the happenings evidence of those similar facts may render it objectively improbable that a person other than the accused committed the act in question, that the relevant act was unintended, or that it occurred innocently or fortuitously. The similar fact evidence is then admissible as evidence relevant to that issue.

[23] ID39 shows the steps taken by the respondent leading to the commission of the earlier offence. The respondent first deflated the tyre of the victim's car and then followed the victim. And on the pretext of rendering assistance to the victim, he then approached the victim. Having got the trust of the victim, he then got into the car of the victim and while in the car, stabbed the victim with a knife. Having killed the victim, he then dropped off the victim at some place and drove off with the car. He later abandoned the car. He took the jewellery and other belongings of the victim. Some of these items were later recovered by the police from the respondent.

[24] The High Court and the Court of Appeal rejected ID39 on the following ground:

> We are in agreement with the trial Judge's assessment that properly considered the evidence which the prosecution seeks to adduce as "similar fact" did not reveal features of such striking similarity as to be of positive probative value. The similarities raised relates to the surrounding circumstances. Causing the victim's tyre to deflate, of subsequently rendering assistance by changing the affected tyre, these features by itself in our view cannot by themselves lead to the conclusion that it was the 1st Respondent who committed the offence of which he now stands charged.

[25] The courts below rejected the similar fact evidence on the basis that there was no striking similarity between what happened in the earlier case and the present case. It should perhaps be noted that the House of Lords in *DPP v. P* had retracted from the test laid down in *Boardman* as to the requirement of 'striking similarity' and said that it was inappropriate to single out 'striking similarity' as an essential element in every case. But following *Boardman,* it was held that the essential feature of admissibility of such evidence is whether its probative force in support of the charge is sufficiently great to make it just to admit the evidence notwithstanding that its prejudicial effect on the accused tending to show that he was guilty of another offence. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.

[26] The test has since been authoritatively laid down by *DPP v. P* in terms of probative value as against its prejudicial effect. There is force in saying that the decision in *DPP v. P* is in line with ss. 14 and 15 of the Evidence Act as 'striking similarity' has never been a requirement of the said sections.

[27] Applying the test in *DPP v. P* to the present case, we are of the view that both the High Court and the Court of Appeal erred in rejecting ID39. Considering the facts as disclosed in ID39, as admitted by the respondent, when compared to the *modus operandi* in the present case, we find that they are very much similar.

[28] In *Black* (1995) Crim LR 640, the English Court of Appeal held that the firm finding of guilt as regards an earlier offence with a similar *modus operandi* to that alleged in respect of the present offences was a significant fact in so far as assessment of probative value of the evidence. In the present case, the respondent had pleaded guilty to the earlier offence as disclosed in ID39. In the circumstances, the evidence of the earlier offence must be treated as fully cogent. For the above reasons, we agree with learned Deputy that whatever prejudice the earlier offence may have on the respondent, it is far outweighed by the probative value of the evidence that is sought to be admitted. We accordingly direct that ID39 be admitted as evidence by the trial judge.

***Prima Facie* Case**

[29] It is the submission of learned Deputy that, independent of the similar fact evidence before the court, at the close of the prosecution case, there is sufficient evidence to establish a *prima facie* case against the respondent. The High Court should in the circumstances have called for the defence.

[30] The learned trial judge made the following findings of facts at the close of the prosecution case. Firstly, through the evidence of PW11, a friend of the respondent and who sold burger for the respondent, sometime in December 1998, he and the respondent met the deceased. This occurred after the deceased car was deflated by the respondent, following which the respondent went to change the tyre of the deceased's car. The deceased gave him her business card showing that she worked for Great Eastern Life. One or two days later, the respondent had asked him for the card. He did not know what happened after that until later in the same month, he was arrested by the police for the offence of stealing sports rim of a car.

[31] He was arrested together with the respondent, Latif and Safuani (the second accused). During the theft, he told the court that they used the car, Proton Iswara with silver metallic colour. He also told the court that the respondent had brought this car to the burger shop. From the evidence adduced, it is established that this car bearing No. PCL 3523, which was used in the theft of the tyre rim of the car belonging to PW10, was the deceased's car, originally bearing No. PCK 6971.

[32] The car was found abandoned behind PW10's house with the tyre rim of PW10's car in the boot. It is the prosecution's case that apart from the car, other personal items belonging to the deceased were found in the respondent's possession namely, her handphone, a dictionary and a calculator.

[33] The other evidence that the need to be considered is the stab wound found on the deceased, a penetrating injury to the left iliac crest of 2cm depth which was likely caused by a knife. Blood stains were found on the cushion cover on the driver seat and the back passenger seat. The blood was of the B group, similar to the deceased's blood group. The skirt worn by the deceased also bore some blood stain.

[34] The evidence before the court also indicated that the respondent had used a knife to puncture the tyre of the deceased's car. A knife was recovered from the car on 27 December 1998.

[35] With all these evidence, in particular possession of the car and other personal items belonging to the deceased, this in our view is sufficient to trigger the presumption under s. 114(a) of the Evidence Act, that a person who is in possession of the stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for it. This court has held that this presumption can also be indicative of any other more aggravated crime which is connected to the theft. (See *Amathevelli P Ramasamy v. PP* [2009] 3 CLJ 109. In *Amathevelli,* the accused was found to be in possession of a gold chain belonging to the deceased. It was proven that the deceased was wearing the gold chain on the date of the murder. This was held by this court to be a material element to connect the accused to the murder of the deceased. This, coupled with other incriminating evidence, was held to be sufficient proof that the accused was guilty of the murder of the deceased.

[36] In the present case, we are of the view that the High Court and the Court of Appeal fell into error in holding that the possession of the car belonging to the deceased could probably be that a third party had sold the deceased's car to the respondent. This is contrary to the established principle that it was not for the court at the close of the prosecution case, to provide a defence for the accused (see *Sunentheran Selvaraja v. PP* MRRJ No: W-09-15-2002; *Jones v. Dunkel* (1958-59) 101 CLR 298).

[37] On the maximum evaluation of the evidence adduced, we hold that the prosecution had clearly made out a *prima facie* case against the respondent. Therefore, had the trial judge and the Court of Appeal admitted ID39 and evaluated the circumstantial evidence in the way that it should have been done instead of giving it merely cursory treatment, their decision might have been otherwise. Accordingly, we direct the High Court to call upon the

respondent to enter upon his defence. However, in view of the fact that the second accused in the present case had been acquitted and discharged by the court below, and we think rightly so on the available evidence, we order that the charge be amended accordingly to reflect the same.

Conclusion

[38] In the result, the appeal is allowed and the orders of the High Court, as affirmed by the Court of Appeal, are set aside. The High Court is hereby ordered to call upon the respondent to enter upon his defence.